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ACTING GOVERNOR

BLOSSOM A. PERETZ, ESQ.
Ratepayer Advocate and Director

June 28, 2001

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JUN 29 2001

FCC MAIL ROOM

Via Overnight Mail
Aaron Goldberger
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 5C320
Washington, DC 20054

Re: I/M/O the Division of the Ratepayer Advocate's ("Ratepayer Advocate's") Petition for Declaratory Ruling Seeking Preemption of Certain Legal Requirements Imposed Upon Telecommunications Carriers by the New Jersey Board of Public Utilities Relating to Sections 251 and 252 of the Federal Telecommunications Act of 1996
CC Docket No. 00-49

Dear Mr. Goldberger:

Pursuant to your request, enclosed is a copy of the briefs filed in the 3rd Circuit Court of Appeals by the New Jersey Division of the Ratepayer Advocate in the matter of *AT&T Communications of New Jersey, Inc. v. Bell Atlantic-New Jersey, Inc., et al.*, Case No. 00-2000. We are serving this letter and the enclosed briefs on all parties who submitted comments or replies in this proceeding as indicated on the Certificate of Service. We ask that these briefs be made part of the record in this proceeding.

Very truly yours,

Blossom A. Peretz, Esq.
RATEPAYER ADVOCATE

By: ______________________
Christopher J. White, Esq.
Asst. Deputy Ratepayer Advocate

CJW:dlc

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2001 I sent, via overnight delivery or hand delivery, a copy of the Ratepayer Advocate's foregoing letter to the Federal Communications Commission, including a copy of the attached briefs where indicated with an asterisk (*), to the following:

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The names above without an asterisk (*) were previously provided copies of the Ratepayer Advocate's briefs as a result of their participation in the 3rd Circuit case.

Christopher J. White
Asst. Deputy Ratepayer Advocate

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FCC MAIL ROOM

Docket No. 00-2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T Communications of New Jersey, Inc.,
Plaintiff

State of New Jersey Division of the Ratepayer Advocate,
Plaintiff-Intervenor

v.

Bell Atlantic-New Jersey, Inc., and
The New Jersey Board of Public Utilities, an agency, and
Herbert H. Tate and Carmen J. Armenti, in their official
capacities as Commissioners of the Board of Public Utilities,
Defendants.

On Appeal from an Order of the
United States District Court, District of New Jersey

BRIEF OF APPELLANT
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE

BLOSSOM A. PERETZ, ESQ.
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November 20, 2000

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CORPORATE DISCLOSURE STATEMENT

The Ratepayer Advocate is an independent agency of the State of New Jersey. The Ratepayer Advocate was established by Governor Christine Todd Whitman of New Jersey under the Reorganization Plan No. 001-1994 ("Plan"), which was codified and is set forth in *N.J.S.A.* 13:1D-1. The Ratepayer Advocate represents the interests of all utility consumers - residential, small business, commercial and industrial. The Ratepayer Advocate is expressly authorized to appear as a party on behalf of ratepayers in all utility matters that are before the Board. *N.J.S.A.* 13:1D-1. Section 9 of the Plan grants to the Ratepayer Advocate, the express authority to:

> a. assist, advise and cooperate with the B[PU] commissioners in the exchange of information and ideas in the formation of long term energy policy and goals which impact all New Jersey's ratepayers;
>
> b. negotiate with utilities on behalf of the ratepayers in an effort to reach an accommodation of views with respect to proposed rate increases;
>
> ***
>
> d. sit on the Advisory Council on Energy Planning and Conservation and on the Energy Master Plan Committee; and
>
> e. appeal any determination, finding, or order of the BPU determined by the Director of the Division to be adverse to the ratepayer interest. *N.J.S.A.* 13:1D-1(9)

STATEMENT OF JURISDICTION

The U.S. District Court for the District of New Jersey ("District Court") retained jurisdiction in this case pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 (the "Act"). 47 U.S.C. § 252(e)(6). The District Court issued, on June 6, 2000, a final order holding that the New Jersey Board of Public

Utilities (the "Board") has authority under the Act to substitute its own interconnection rates for rates reached by parties pursuant to the arbitration provisions of the Act. On June 30, 2000 Petitioners filed a Notice of Appeal in accordance with Rules 3 and 4 of the Federal Rules of Appellate Procedure. This Court has jurisdiction to review the order of the District Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in not granting summary judgment by holding that the Board has legal authority under the Act to substitute its own generic rates for rates set by arbitration pursuant to Sections 251 and 252 of the Act. (4a, 5a, 13a, 14a, 47a, and 224a-264a; see also Exhibit A attached hereto)
2. Whether the District Court erred in not granting summary judgment by holding that Section 261 of the Act authorizes the Board to substitute its uniform rates for rates set by arbitration. Such decision is erroneous because substitution of uniform rates is inconsistent with the requirements of the Act and the Federal Communications Commissions ("FCC") orders under the Act. (4a, 5a, 13a, 14a, 47a and 224a-264a; see also Exhibit A attached hereto)

STATEMENT OF THE CASE

Petitioners appeal the District Court's decision holding that the Act authorizes the Board to substitute its own rates for rates adopted pursuant to the arbitration procedures set forth in

Sections 251-52 of the Act. This litigation began on November 24, 1997 when AT&T filed a complaint in Federal District Court seeking review under Section 252(e)(6) of the Act. (9a, 44a) The District Court entered a Consent Order for Intervention by the Ratepayer Advocate on February 2, 1998. (44a) On June 6, 2000, the District Court issued its ruling, holding that the Board has authority under the Act to substitute its own rates for arbitrated rates, though the actual rates that the Board did establish were arbitrary and capricious. The Ratepayer Advocate filed a Notice of Appeal on June 30, 2000 appealing that part of the District Court decision holding that the Act authorizes the Board to substitute generic provisions for the terms of an agreement reached by arbitration under the Act. (1a) Additional procedural history is provided in the Statement of the Facts immediately below.

STATEMENT OF THE FACTS

A. The Telecommunications Act of 1996

Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) (the "Act" or "1996 Act"), to decisively alter the preexisting legal framework governing the provision of telephone services, to foster competition in local telephone service, to impose new obligations on incumbent local telephone exchange companies, and to preempt state regulatory constraints on the emergence of competition. Congress's stated goal of the 1996 Act is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *1996 Act*, Pub. L. No. 104-104, 110 Stat. at 56 (purpose statement).

Prior to the 1996 Act, state public utility commissions ("state commissions") pervasively regulated local telephone service as a monopoly and granted an exclusive franchise to provide service in a particular area to an incumbent local exchange carrier ("ILEC"). See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at ¶ 1. Consequently, the ILECs effectively exercised exclusive dominion over the means by which consumers placed and received telephone calls. Congress designed the 1996 Act to remove the legal impediments to entry and competition in the provision of local telephone service. The Act embodied Congress's firm belief that "facilities-based competition" is possible and in the best interests of the public. See H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 124, 160. ("Conference Report"). Therefore, the Act established a carefully-planned, pro-competitive framework for promoting facilities-based competition. See, *e.g.*, *id.* at 113; Pub. L. No. 104-104, 110 Stat. 56 (1996).

AT&T had traditionally provided most local and long distance telephone service throughout the United States. However, in 1974, the United States filed an antitrust action against AT&T for allegedly monopolizing "a broad variety of telecommunications services and equipment in violation of section 2 of the Sherman Act." *United States v. AT&T*, 552 F.Supp. 131, 139 (D.D.C. 1982). The eventual settlement reached between AT&T and the government became known as the Modified Final Judgement ("MFJ") and required AT&T to divest itself of the 22 regional Bell operating companies ("RBOCs" or "BOCs") that provided local telephone service, including Bell Atlantic, the RBOC serving the middle Atlantic states, and Bell Atlantic-New Jersey, the BOC providing service in New Jersey. The MFJ prohibited the BOCs from offering long-distance service. *See Id*, at 188. The BOCs continued to retain a monopoly in local telephone service in their respective regional areas. *Id*.

The regulatory landscape created by the MFJ remained relatively unchanged until Congress enacted the 1996 Act. Congress recognized that the mere removal of the legal protections traditionally afforded ILECs would not, by itself, accomplish its goal of facilities-based competition. Congress understood that the ILECs, such as Bell Atlantic-New Jersey, provided services and were the gatekeepers to nearly every telephone consumer in their respective service areas. See *Local Competition Order*, at ¶ 10; H.R. Rep. No. 104-204, at 74, *reprinted in*, 1996 U.S.C.C.A.N. 10, 39. Congress also realized that new entrants could not effectively compete with the ILECs, if the entrant were required to duplicate the ILEC's network before providing local service. See *Conference Report*, at 148.

Therefore, Congress sought to facilitate competition in the provision of local telephone services by specifically requiring in the 1996 Act that ILECs open their networks to new entrants. The Act compels ILECs (i) to permit requesting telecommunications carriers to interconnect their facilities with the ILEC's network, *see* 47 USC § 251(c)(2); (ii) to lease certain elements of their local network to competitors on unbundled basis, see 47 USC § 251(c)(3); and (iii) to sell to other carriers, at wholesale rates, any telecommunications services that the ILEC provides to its own customers at retail rates in order to allow those carriers to resell the services, see 47 USC § 251(c)(4).

The 1996 Act authorizes expedited procedures to further effectuate competition in local telephone service in a timely manner. The Act invites telecommunications carriers to "negotiate" with the ILEC to establish terms and conditions for entry into the local telephone market. See 47 USC § 252(a)(1).

The Act permits any party to the negotiation to petition the state commission to mediate, see 47 USC § 252(a)(2), or to arbitrate, *see* 47 USC § 252(b), any unresolved or disputed issues. In addition, the Act requires that any such arbitration be completed by the state commission "not later than 9 months after the date on which the local exchange carrier received the request [for interconnection] under this section." 47 USC § 252(b)(4)(C). The Act limits the state commission to consideration of only those "issues set forth in the petition and in the response" to the petition for arbitration. 47 USC § 252(b)(4)(A). The Act makes clear that a state commission "may only reject...an agreement (or any portion thereof) adopted by arbitration...if it finds that the agreement does not meet the requirements" of the Act or the implementing regulations of the FCC. 47 USC § 252(e)(2). The Act also mandates that any such rejection be accompanied by "written findings as to any deficiencies." 47 USC § 252(e)(1).

Congress also established specific pricing standards to govern the rates that ILECs may charge competitive telecommunications carriers for interconnection ("interconnection rates") to the ILECs' local network. *See* 47 USC § 252(d). Congress specifically mandated that

> Determinations by a State commission of the just and reasonable rate for interconnection of facilities and equipment...shall be based on the cost (determined without reference to a rate-of-return of other rate-based proceeding) of providing the interconnection...and nondiscriminatory, and may include a reasonable profit.

47 USC § 252(d)(1)(A)-(B). Congress also directed the Federal

Communications Commission ("FCC") to establish regulations to implement the requirements of the Act within six months of the date of enactment. *See* 47 USC § 251(d)(1).

In compliance with the Act, the FCC issued several pricing rules in its *Local Competition Order* on August 8, 1996. With regard to the pricing of interconnection and network elements, the FCC adopted a forward-looking economic cost methodology based on the total element long-run incremental cost ("TELRIC"). See *Local Competition Order*, at ¶ 685. State commissions are to apply TELRIC to determine the permissible interconnection rate that an ILEC may charge a competitive telecommunications carrier exercising its right to interconnect under Section 251(c)(2) and thereby compete with the ILEC in providing local telephone service directly to consumers. *Id.* The FCC's authority under the 1996 Act to design and promulgate a pricing methodology was affirmed by the United States Supreme Court. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). On remand from the Supreme Court in the same case, the United States Court of Appeals for the Eighth Circuit specifically upheld the FCC's use of a TELRIC forward-looking cost methodology to calculate interconnection rates in compliance with the 1996 Act. *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

B. The AT&T/BA-NJ Arbitration

On March 1, 1996, AT&T requested that Bell Atlantic-New Jersey ("BA-NJ"), the ILEC in New Jersey, enter into an interconnection agreement pursuant to Section 252(a) of the 1996 Act. Although the parties negotiated certain terms and conditions, AT&T petitioned the New Jersey Board of Public Utilities (the "Board") on July 15, 1996 to arbitrate the unresolved issues. On August 15, the Board appointed retired state court judge Paul Thompson to arbitrate the interconnection agreement between AT&T and BA-NJ. (50a-53a)

Pursuant to a request by Judge Thompson, AT&T and BA-NJ filed supplemental pleadings to describe the results of their further negotiations on August 30, 1996. AT&T indicated its willingness to proceed with discovery and rely on its proposed cost study, the "Hatfield Model." BA-NJ argued that Judge Thompson should adopt "interim" rates based on the FCC's *Local Competition Order*.[1] Judge Thompson held hearings from September 23, 1996 through October 15, 1996. The transcripts for the 12 days of the hearing totaled 3600 pages. The parties introduced 172 exhibits, presented 18 witnesses, and submitted more than 250 pages in post-arbitration briefs.

On November 8, 1996, Judge Thompson issued his written opinion. (98a-113a) Judge Thompson found that a modified version of the cost model proposed by AT&T properly calculated the forward-looking economic costs of interconnection. Therefore, Judge Thompson established permanent rates and calculated incremental costs based on TELRIC.

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[1] At a prehearing conference on September 12, 1996, BA-NJ reiterated that it planned not to present its own cost-studies and intended to rely on rates based on the FCC's *Local Competition Order*.

C. **The "Generic" Proceedings**

Within 11 days of Judge Thompson's decision, BA-NJ petitioned the Board to reverse Judge Thompson and impose interim rates based on the FCC's *Local Competition Order* until permanent rates were established by the Board. The Board never explicitly ruled on the motion. Rather, the Board sought comments regarding BA-NJ's request that all arbitrated rates be deemed "interim" pending the resolution of the Board's ongoing "generic" rate proceeding.

The origins of the "generic" proceeding date back to December, 1995. Prior to the enactment of the 1996 Act, the Board initiated an investigation and rulemaking-proceeding to determine whether to permit competition in local telephone service. The subsequent passage of the 1996 Act imposed specific requirements on state commissions to promote competition. The Board recognized its role under Sections 251 and 252 of the Act in the mediation, arbitration, and approval of interconnection agreements and adopted a two-step process to fulfill its role in furthering competition in local telephone service. See Order, Docket No. TX95120631, at 2 (June 20, 1996) (the "June 20 Order"). (94a-96a) The June 20 Order provided (1) that the rates, terms, and conditions resulting from the "generic" proceeding would generally be available for parties to freely adopt in negotiating and arbitrating interconnection agreements and (2) that any "generic" rates, terms, and conditions determined by the Board in its rulemaking proceeding would not supersede any negotiated or arbitrated rates, terms, and conditions. *See* June 20 Order, at 2 ("the generally available terms and conditions that result from the generic proceeding will *not supersede* arbitrated terms and conditions") (emphasis added).

As a result, the Board continued to support Judge Thompson's efforts to arbitrate an interconnection agreement between AT&T and BA-NJ pursuant to Section 252 of the 1996 Act, while, contemporaneously, it progressed with its entirely distinct and separate "generic" proceedings. On August 15, 1996, the Board reaffirmed its commitment to ensure that its review of negotiated and arbitrated interconnection agreements remained independent of its "generic" proceedings. (50a-53a) The August 15 Order memorialized earlier assurances by the Board in its open public meetings. Although, as noted above, the "generic" proceeding began months before AT&T requested interconnection with BA-NJ, it extended for more than a year beyond the date on which arbitration between AT&T and BA-NJ concluded.[2]

D. **Backtracking: Obliterating the Lines between the AT&T/BA-NJ Arbitration and the Separate and Distinct "Generic" Proceeding**

Although AT&T began, continued, and expected to conclude a negotiated and arbitrated interconnection agreement with BA-NJ independent of and without interference from the results of the Board's separate and distinct "generic" proceeding, the Board backtracked, from its earlier commitments and erased the lines between the arbitration and the "generic" proceeding. On July 17,

[2] AT&T requested interconnection with BA-NJ on March 1, 1996. Judge Thompson issued his written opinion on November 8, 1996. The Board issued its "Generic Order" on December 2, 1997.

1997, the Board first announced its "generic" rates for interconnection at an open public meeting. The "generic" rates were substantially higher than the interconnection rates that were arbitrated between AT&T and BA-NJ. At the same meeting, it was also suggested that the new "generic" rates should supersede the AT&T/BA-NJ arbitrated rates. (69a, 177a, 203a, 220a at ¶18)

Prior to the July 17 public meeting, AT&T and BA-NJ had finalized an interconnection agreement that included the arbitrated interconnection rates. However, on July 23 and July 25, 1997, BA-NJ stated that it would refuse to sign any interconnection agreement that included the arbitrated rates and insisted that the "generic" rates supersede the arbitrated rates in the interconnection agreement. (70a, 177a, 203a, 220a at ¶19) As a result of the impasse, AT&T and BA-NJ submitted two different versions of the interconnection agreement for the Board's consideration. On July 25, 1997, AT&T submitted for Board approval, pursuant to Section 252(e) of the 1996 Act, an interconnection agreement that included the arbitrated rates. (70a, 177a, 203a, 220a at ¶20) On August 5, 1997, BA-NJ presented the Board with an interconnection agreement that incorporated the "generic" interconnection rates. In addition, the parties filed briefs and reply briefs with the Board to support the Board's consideration and approval of their respective interconnection agreement. (70a, 177a, 203a, 220a at ¶20)

On September 9, 1997, the Board ruled in favor of BA-NJ and required the parties to substitute the "generic" interconnection rates for the rates that were arbitrated between AT&T and BA-NJ. (70a-71a, 178a, 203a-204a, 221a at ¶21) AT&T, under protest and reserving all of its rights, executed BA-NJ's version of the interconnection agreement on September 15, 1997. The Board approved the agreement at its public meeting on October 8, 1997. As part of its "generic" proceeding, the Board issued a written order on December 2, 1997, to memorialize the decisions rendered by the Board at the September 9 and October 8 public meetings and to explain the basis for its actions in superseding the arbitrated rates with its "generic" rates. *See* Order, Docket No. TX95120631 (Dec. 2, 1997) ("Generic Order"). (114a-156a) On December 22, 1997, the Board confirmed its approval of the agreement in writing. *See* Order, Docket Nos. TO96070519 and TO96070523 (Dec. 22, 1997). (157a-166a)

E. The Decision of the United States District Court for the District of New Jersey and the Appeal to the United States Court of Appeals for the Third Circuit

On November 24, 1997, AT&T filed a Complaint with the District Court seeking review of the Board's decision to substitute the interconnection rates that were the result of arbitration pursuant to Section 252 of the 1996 Act with its "generic" rates in AT&T's proposed interconnection agreement. *See AT&T Comm. of N.J., Inc. v. Bell Atlantic-New Jersey, Inc.*, Civ. No. 97-5762 (D.N.J. June 6, 2000). AT&T filed an Amended Complaint on January 12, 1998. (54a-92a)

On January 29, 1998, the District Court executed a Consent Order for Intervention by the Ratepayer Advocate.[3] On February 17, 1999, the Ratepayer Advocate filed a Motion for Summary Judgement. The Ratepayer Advocate asked the District Court to grant summary judgment on four separate and independent bases. These four bases raise only questions of law which justified granting summary judgment to the Ratepayer Advocate. The Ratepayer Advocate submitted its statement of material facts, asserting that there existed no genuine issue of material fact in accordance with Rule 56 of the Federal Rules of Civil Procedure. Neither the Board nor BA-NJ contested the statement of facts proffered by the Ratepayer Advocate, or offered any statement as to material facts they felt were in dispute so as to preclude summary judgment.

First, the Ratepayer Advocate argued that the Board lacked statutory authority under Sections 251 and 252 of the Act to substitute rates from the "generic" proceeding for the interconnection rates that were the result of arbitration between AT&T and BA-NJ. According to the Ratepayer Advocate, the Board's actions were therefore *ultra vires.* Second, the Ratepayer Advocate contended that the Board's actions were preempted under the Supremacy Clause of the United States Constitution, the 1996 Act, and the FCC rules and regulations issued pursuant to the 1996 Act.[4]

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[3] The District Court entered the Consent Order on February 2, 1998. As Plaintiff-Intervenor, the Ratepayer Advocate adopted the AT&T pleadings as its own.

[4] U.S. Const., art. VI, cl.2 (*Supremacy Clause*).

Third, the Ratepayer Advocate stressed that the interconnection agreement between AT&T and BA-NJ was arbitrated in accordance with the Act and could not be rejected by the Board under Section 252(e)(2)(A) and (B). Fourth, the Ratepayer Advocate maintained that BA-NJ waived its rights to challenge the arbitrated provisions and should be estopped from challenging those provisions in this proceeding.

On June 6, 2000, the District Court issued its opinion[5] and "affirm[ed] the Board's decision to substitute generic rates for arbitrated rates as a proper exercise of authority under the Act." *See AT&T v. BA-NJ,* Civ. No. 97-5762, at 8-11. (13a-16a) At the same time, however, the District Court identified several legal errors made by the Board. In particular, the District Court held that the specific "generic" rates for interconnection established by the Board were the result of "arbitrary and capricious" decision making. Though the District Court affirmed the authority of the Board to supersede arbitrated rates with generic rates, the Court found that the specific rates implemented by the Board were the result of an "arbitrary and capricious" decisional process. The Board's "carte blanche" acceptance of nonrecurring UNE rates as proposed by BA-NJ was also found to be "contrary to the evidence in the record and so is arbitrary and capricious." *Id.* at 31. The

[5] In deciding the case, the District Court never specifically addressed any of the Ratepayer Advocate's arguments for summary judgement. The District Court's discussion rejected, in effect, both the *ultra vires* and the Section 252(e)(2) arguments and ignored entirely the preemption and waiver contentions.

District Court reversed and remanded the Board's determinations respecting dark fiber and subloop unbundling as being in violation of the FCC's Third Report and Order ¶¶ 152-153 and 220-222. *Id.* at 13 and 15 respectively. The District Court also remanded back to the Board for reconsideration, its determination regarding cable fill factor as being inconsistent with TELRIC, (*Id.* at 34) and its decisions to restrict CLEC availability of wholesale discounts for customer specific pricing arrangements of the incumbent carrier. *Id.* at 21.

On November 14, 2000 the Ratepayer Advocate filed with the District Court a letter requesting that certain items be added to the docket entries in the case (224a-264a)

Since the issue of properly negotiated interconnection rates is so vital to the goals of a competitive telecommunications marketplace, the Ratepayer Advocate has appealed that portion of the District Court's decision which affirmed the actions of the Board below in substituting the generic interconnection rates for those reached through arbitration.

STATEMENT OF RELATED CASES AND PROCEEDINGS

On March 3, 2000, the Ratepayer Advocate filed a Petition For Declaratory Ruling seeking preemption by the Federal Communications Commission ("FCC") of certain legal requirements imposed by the New Jersey Board of Public Utilities arising from the its order in Docket No. TX95120631 (otherwise referred to as the "Generic Proceeding"). CC Docket No. 00-49.

The Ratepayer Advocate asked the FCC to declare that